No. 89-390

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,
v.

THE LTV CORPORATION; LTV STEEL COMPANY, INC.; THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF LTV STEEL COMPANY, INC. AND CERTAIN AFFILIATES; PARENT CREDITORS COMMITTEE OF THE LTV CORPORATION; LTV BANK GROUP; OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS; BANCTEXAS DALLAS, N.A.; FIFTH THIRD BANK; HUNTINGTON NATIONAL BANK; CITIBANK, N.A.; DAVID H. MILLER; AND WILLIAM W. SHAFFER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. PBGC REASONABLY EXERCISED ITS AUTHORITY UNDER SECTION 4047 OF ERISA IN RESTORING LTV'S PENSION PLANS IN RESPONSE TO FOLLOW-ON ABUSE.

The broad language of section 4047 of ERISA—deftly ignored by virtually all the respondents [1]—controls this case. In section 4047, Congress authorized the PBGC to restore a pension plan "in any such case in which *the corporation* [PBGC] determines such action to be appropriate and consistent with its duties under [Title IV of ERISA]." Under fundamental principles of administrative law, PBGC's exercise of this broad discretionary authority to enforce its policy against abusive follow-on plans must be sustained unless the policy is unreasonable or based on an impermissible construction of the statute. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *Batterton v. Francis*, 432 U.S. 416, 425-26 (1977). This is especially true when a court is reviewing an agency's understanding of a "very complex statute" like ERISA. *See Young v. Community Nutrition Institute*, 476 U.S. 974, 981 (1986); *Mead Corp. v. Tilley*, 109 S. Ct. 2156, 2162, 2164 (1989).

PBGC's policy is straightforward: an employer may not use the termination insurance program to subsidize ongoing pension arrangements. Abusive follow-on plans negate Title IV's insurable event—plan termination—and eviscerate the benefit limitations (the "coinsurance" feature) [2] built into the statutory scheme, thereby allow-

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[1] One respondent, the Official Committee of Equity Security Holders, did comment candidly on the statutory language:

> Congress set no substantive standards for such restoration, or for the procedure to be utilized by the agency other than as articulated in the Administrative Procedure Act . . . .

Equity br. at 7.

[2] Far from being "the invention of a PBGC employee," Wheeling-Pittsburgh br. at 25 n.20, "coinsurance" is a well-known insurance

ing employers to overcome the opposition of employees and unions to termination.

PBGC's policy did not arise as an abstraction, but was born directly from the agency's experience with abusive terminations. It was originally articulated in 1981, in response to attempts by two different employers that sought to invoke PBGC's guarantees while continuing to provide substantially the same benefits as before termination. Pet. App. 159a, 165a. It was reiterated in 1986, when the Wheeling-Pittsburgh Steel Corporation sought to reorganize in bankruptcy by terminating its insured plans (with a $500 million deficiency). As in this case, the USWA dropped its opposition to the termination of the plans when the company agreed to follow-on plans. *See* Pet. App. 174a.[3]

The three opinion letters resulting from these incidents made clear that, although ingenious employers may structure follow-on plans in many ways, the hallmarks of an abusive follow-on plan are the crediting of service under the former plan and the replacement, on an ongoing basis, of substantially all benefits not guaranteed by the PBGC. The letters also warned that, where follow-on plans were established, a pension plan "would not be treated as terminated" and PBGC "would be constrained to exercise its authority under Section 4047" to restore the former plan. Pet. App. 163a-164a, 178a.[4]

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concept. *See* C.A. Williams Jr. and R. Heins, *Risk Management and Insurance* 484 (6th ed. 1989). By forcing the insured to bear part of the loss, coinsurance "discourage[s] overutilization of services by the insured." *Id.* The concept is endorsed in the legislative history of ERISA, which shows that the explicit benefit limitations in the statute were intended to function that way. *See* S. Rep. No. 383, 93d Cong., 1st Sess. 81 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4965.

[3] Thus, LTV is simply wrong when it argues that "[t]here is no evidence—in the record of this case or anywhere else—to suggest that unions are prepared to modify their uniform hostility to plan termination." Br. at 27.

[4] Contrary to the suggestion of some of the respondents (Equity Committee br. at 22; Wheeling-Pittsburgh br. at 7), PBGC's view

PBGC's policy was thus publicized and generally understood, including by LTV and the USWA. *See, e.g.*, AFL-CIO/USWA br. at 12 n.9 (describing effects of the policy).[5] And the parties had ample opportunity to explore the details of PBGC's policy well before the Plans were restored. PBGC's Executive Director and the Manager of PBGC's Actuarial Policy Division presented affidavits at the bankruptcy court hearing on LTV's application for approval to fund the follow-on plans, and were personally available for cross-examination at that time. LTV, however, chose not to inquire further about the substance or application of PBGC's policy. JA 226-237.

The only restriction Congress placed on PBGC's restoration authority under section 4047 was that PBGC exercise its discretion "consistent with its duties" under Title IV. 29 U.S.C. § 1347. LTV's assertion that follow-on abuse is "logically irrelevant" because "ERISA . . . makes financial improvement both a necessary and sufficient condition for restoration" (br. at 33), is therefore meritless. *See also* Steel Creditors br. at 13 (even if follow-on plans are illegal, they may not be a basis for restoration). Nothing in ERISA so limits the plain language of section 4047, and PBGC has determined that follow-on abuse alone is sufficient, at least where, as here,

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in these cases did not turn on any assumption that the employers were solvent. In one of the 1981 cases, the PBGC noted explicitly that the sponsor "may have had little, if any net worth . . . ." Pet. App. 160a. In the Wheeling-Pittsburgh case, the employer was in bankruptcy. *See* JA 228.

[5] For example, the president of the United Autoworkers Union wrote to his U.S. staff on December 8, 1981:

> One such proposal is to terminate an existing plan, on the theory that the workers involved can be protected by a combination of government guaranteed benefits, and negotiating a new pension plan which will provide any non-guaranteed benefits. Aside from any other objections to that type of proposal, *the government agencies involved have made it clear that they will not approve such a replacement scheme.*

Pet. App. 184a (emphasis added).

restoration would not be a futile act.[6] In such circumstances, restoration is plainly "appropriate and consistent" with PBGC's duties under Title IV.[7]

PBGC's duties under Title IV are to: (1) "encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants"; (2) "provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries"; and (3) "maintain premiums established by the corporation

[6] Wholly apart from LTV's improved financial circumstances, each of the Plans themselves had sufficient assets, even without further contributions, to pay benefits for several years. *See* AR 1153. Moreover, as PBGC informed LTV, restoration meant that the company was again legally obligated to make contributions to the Plans. Pet. App. 183a.

By contrast, PBGC did not restore the one LTV Steel plan (Republic Salaried) that could not pay currently due benefits. *See* JA 318. *See also* n.17, *infra*. Another reason for not restoring that plan was that PBGC expected to recover 100 percent of the plan's asset insufficiency. JA 318. Contrary to the suggestion in some of the opposing briefs, this does not show that PBGC was concerned only about its own interest. Rather, if PBGC recovered 100 percent of the insufficiency, no follow-on abuse would occur with respect to that plan because there would be no PBGC subsidy of the ongoing benefit package.

[7] Equally meritless is Wheeling-Pittsburgh's argument that PBGC's authority under section 4047, as originally enacted, could only be used to restore plans involuntarily terminated by PBGC, and that Congress therefore could not have intended PBGC to use this authority to remedy abuse. Br. at 13-16. The reference in the original version of section 4047 to plans "terminated under section 4042," on which this argument relies, encompassed the termination of *all underfunded* plans, without regard to whether the termination was initiated voluntarily by the employer or involuntarily by the PBGC. *See* 29 U.S.C. § 1341(c) (1982) (requiring PBGC to commence proceedings under section 4042 upon determining that plan is underfunded). Thus, when Congress amended section 4041 in 1986 to permit the termination of an underfunded plan without resort to section 4042, section 4047 was also amended, so that PBGC's restoration authority would continue to encompass all underfunded terminations. 29 U.S.C. § 1341(c) (Supp. IV 1986); 29 U.S.C. § 1347 (Supp. IV 1986). *See* PBGC br. at 22 n.15.

under section 1306 of this title at the lowest level consistent with carrying out the obligations of this subchapter." 29 U.S.C. § 1302(a). By effectuating ERISA's express purpose of discouraging terminations, *Nachman Corp. v. PBGC*, 446 U.S. 359, 381-82 (1980), PBGC's policy against abusive follow-on plans implements each of PBGC's duties under Title IV.[8] It encourages the continuation of private pension plans by forcing employees, unions and employers to confront the full consequences of termination. By deterring abusive terminations, it helps provide for the timely and uninterrupted payment of benefits to participants and beneficiaries. And by discouraging such terminations, thereby limiting PBGC's losses, it keeps premiums "at the lowest level" consistent with PBGC's other obligations. Indeed, by keeping premiums low, PBGC encourages the maintenance of pension plans by other employers.[9]

PBGC recognizes, of course, that enforcement of its policy may result in some participants and beneficiaries losing the opportunity to obtain benefits in excess of those guaranteed by Congress. But PBGC was entitled to balance this risk against the other positive consequences of its policy and give greater weight to the protection of the system as a whole. *See Chevron*, 467 U.S. at 865-66. *See also SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947). Moreover, because the whole purpose of PBGC's policy is to deter unnecessary terminations, the total

[8] The union *amici*'s argument that a follow-on plan does not increase PBGC's financial burden in a particular case therefore misses the point. Permitting follow-on plans will lead to terminations in other cases, and these additional terminations will indisputably increase PBGC's financial burden.

[9] PBGC has noted the competitive pressures created when one employer reaps a government subsidy for its pension plan, not because the agency views itself as the "guardian of 'competitive balance' in the steel industry" (Wheeling-Pittsburgh br. at 25), but because a cost advantage arising from an artificial termination by one company will encourage its competitors to follow suit, thereby increasing the cost of the insurance program to the remaining premium payers.

number of individuals adversely affected by the policy will be limited.[10]

Respondents are simply wrong in arguing that PBGC's policy conflicts with ERISA's "bedrock purpose" of ensuring payment of full pension benefits. *E.g.*, LTV br. at 23-26; LTV Bank Group br. at 36. Title IV was never intended to guarantee full benefits after plan termination. To the contrary, Congress expressly limited the benefits PBGC may pay when an underfunded plan terminates "because [Title IV] insurance is not intended as a full replacement of a pension plan, but rather as covering the basic retirement benefits provided under it." S. Rep. No. 383 at 81, *reprinted in* 1974 U.S. Code Cong. & Admin, News at 4965. Moreover, while ERISA was generally designed to protect employee benefits, it is perfectly reasonable for PBGC to conclude that that goal is best met under Title IV by ensuring the continued availability of a fiscally sound pension insurance program to operate as a safety net when private arrangements fail. *See Nachman*, 446 U.S. at 374.[11]

PBGC's policy is not inconsistent with the position the agency took in *Murphy v. Heppenstall*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982). In *Heppenstall*, where retirees were seeking contract damages from their employer for the difference between their guaranteed benefits and those benefits that had *vested* (i.e., been earned) *before* termination, PBGC argued, and the court held, only that ERISA did not preempt the retirees' action for those vested benefits. *Cf. Nachman*, 446 U.S. at 374 (Congress sought to protect "vested"

[10] Indeed, in this case, restoration results in the reinstatement of full benefits for all of the participants in the LTV Steel Plans, at the same time that it provides protection for the system as a whole.

[11] The importance of this objective was recently highlighted in the President's 1991 budget submission to Congress, which described the PBGC insurance program as one of the "hidden PACMEN" "waiting to spring forward and consume another line of resource dots in the budget maze." Budget of the United States Government, Fiscal Year 1991 at 15, 253-54 (discussion of PBGC).

benefits). *Heppenstall* did not involve the accrual of additional benefits under an *ongoing* arrangement that effectively continued the plan as if no termination had occurred.

Similarly, neither section 4049 of ERISA, 29 U.S.C. § 1349 (Supp. IV 1986), nor section 4022(c), 29 U.S.C. § 1322(c) (Supp. V 1987), enacted in 1987 to replace section 4049, authorizes the continued accrual of benefits based on past service or permits participants to qualify for benefits based on events occurring after termination. Section 4049, displacing the *Heppenstall* concept, established a procedure for the appointment of a trustee after plan termination to collect from the employer and distribute to participants a specified percentage of the benefits earned prior to termination but not guaranteed by PBGC. Section 4022(c) authorizes the PBGC itself to collect both nonguaranteed and guaranteed benefits, and to distribute at least a portion of the nonguaranteed benefits to participants.[12] Far from being inconsistent

[12] The statute thus provides for the payment of at least a portion of the nonguaranteed benefits earned prior to the date of termination. And PBGC's policy does not preclude the establishment of a new plan after termination which provides benefits solely on the basis of employees' post-termination service. But PBGC's policy is violated by the continued accrual of benefits based on past service and the awarding of benefits under the old plan based on events occurring after termination. For example, when an employee with 25 years of service at the date of termination becomes eligible for a full "30 and out" pension with only 5 more years of service under the follow-on plan, the old plan has effectively continued. Similarly, a follow-on plan might provide for "shutdown benefits" based on service under the old plan in the event of a shutdown occurring after termination. In each case, the amount of benefits payable from the follow-on plan is keyed to the amount that would have been payable from the terminated plan, but the follow-on plan pays only the difference between the latter amount and the amount of the employee's guaranteed benefit from PBGC. And where, as here, these objectionable features are coupled with the replacement of virtually all nonguaranteed benefits and benefit accruals based on post-termination service, all aspects of the arrangement violate PBGC's policy, because the terminated plan is then replicated in its entirety.

with PBGC's policy (LTV br. at 25-26; AFL-CIO/USWA br. at 16-17), these provisions plainly suggest that to the extent Congress intended participants to recover vested benefits beyond those guaranteed by PBGC, it provided for them directly.[13]

Lacking support in the language, purposes or original legislative history of ERISA, respondents—like the courts below—place great weight on legislative materials created three months *after* the agency restoration decision at issue in this case. In December 1987, Congress failed to enact a proposal by the House Ways and Means Committee that would have proscribed any "arrangement under which retirement benefits are provided" for five years after plan termination. Wheeling-Pittsburgh br. at 23 n.17. At best, this subsequent congressional inaction is ambiguous. As LTV itself acknowledges (br. at 30), there were *two* proposals pending before Congress. PBGC's proposal would have proscribed only those retirement programs "which, in whole or in part, provide substantially similar benefits within five years after termination . . . ." *See* AFL-CIO/USWA br. at 22. The Ways and Means Committee did not adopt PBGC's proposal, but instead proposed the more drastic prohibition quoted above. Congress enacted neither.

Under these circumstances, no clear inference about Congress's intent can be drawn. Indeed, Congress's failure to enact any changes in this area, when it was well aware of the restoration of the LTV Plans (*see* PBGC br. at 25), could easily indicate approval of PBGC's policy. *See, e.g., Young v. Community Nutrition Institute*, 476 U.S. at 983; *United States v. Wise*, 370 U.S. 405, 411 (1962).[14]

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[13] Contrary to LTV's current argument (LTV br. at 31 n.19), section 4049 recoveries, even when coupled with a future-service defined contribution plan, plainly do not achieve the same degree of benefit replacement as LTV's follow-on plans. *See* n.12, *supra*. Here, in fact, both LTV and the USWA rejected PBGC's proposal that they adopt precisely such a package in lieu of the follow-on plans. JA 262-67.

Contrary to the arguments of the AFL-CIO/USWA (br. at 18-21), the 1986 SEPPAA amendments do not eliminate the need for PBGC's policy. To be sure, SEPPAA's imposition of a distress requirement made it more difficult for an employer to terminate an underfunded pension plan, *see* 29 U.S.C. § 1341(c)(2)(B) (Supp. IV 1986), but an employer that obtains a bankruptcy court order could still terminate. And SEPPAA did not reduce the powerful incentive for employers to dump their pension liabilities on PBGC.[15] Although SEPPAA increased the employer's liability to PBGC, that liability was still generally limited to 75 percent of guaranteed benefits. 29 U.S.C. § 1362(b) (Supp. IV 1986). A discharge in bankruptcy typically permits the employer to eliminate even that liability for much less than 100 cents on the dollar.[16]

Moreover, PBGC's follow-on policy is intended not only to *discourage* plan termination, but to *encourage* better funding of pension plans. *See* PBGC Pet. at 16 & n.14.

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[14] The cases cited by LTV (br. at 32) and the Parent Creditors' Committee (br. at 28-29) in an attempt to give meaning to this inaction either contradict their assertions or are inapposite. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982) *and Atkins v. Rivera*, 477 U.S. 154, 166 n.10 (1986) (history of bills *actually enacted*); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982) *and Bradley v. School Board of City of Richmond*, 416 U.S. 696, 716 n.23 (1974) (contemporaneous legislative history); *Bowsher v. Merck & Co.*, 460 U.S. 824, 837 n.12 (1983) (subsequent legislative inaction, examined to determine whether agency's position had been consistent, "not conclusive" with respect to interpretation of a prior enactment).

[15] Indeed, as the district court noted, LTV has conceded that this was "one of the principal goals" of its filing for bankruptcy reorganization. Pet. App. 101a.

[16] The PPA amendments, enacted after the restoration in this case, likewise do not eliminate the potential for abusive terminations. *See* PBGC Reply to Opp. Cert. at 2.

Full funding eliminates any incentive to terminate, because the employer has no liabilities to dump on PBGC. And where underfunded terminations nevertheless occur, the impact on the insurance program will be less if unions and employees have been motivated to insist on better funding.

In any event, this case demonstrates a means of circumventing the distress requirement for terminations. By failing to make required contributions to its plan or by other means, an employer may be able to cause the plan to run out of money entirely, at which point PBGC is statutorily required to terminate it. 29 U.S.C. § 1342(a). (This in fact happened with one of LTV Steel's plans. JA 122.)[17] Even if the plan still has assets remaining, its deteriorating financial condition could pose the risk of large losses to the insurance program, making termination the prudent course for the PBGC. *See* 29 U.S.C. § 1342(a). Once the plan is safely terminated and the liabilities shifted to PBGC, the employer could then establish follow-on plans. This, of course, is just what LTV did here.[18]

[17] The court of appeals' statements regarding the bankruptcy priority of pension contributions enhance the danger that reorganizing employers will cease making contributions to their pension plans. *See infra* at 15-17. Here, moreover, the Republic Salaried Plan was so severely underfunded that even if *all* minimum funding contributions had been made, the plan still would have had insufficient assets to pay benefits as they became due. *See* JA 318. Thus, contrary to LTV's assertions (br. at 4), PBGC's decision to terminate this plan did not reflect any view as to the priority of the contribution liability, but simply fulfilled PBGC's statutory obligations.

[18] The distinction between voluntary and involuntary terminations, urged in an attempt to distinguish PBGC's prior opinion letters (LTV br. at 35-36), therefore has little practical import. The possibilities for abuse, and the rationale for opposing follow-on plans, are the same in either case. As the judge in the Wheeling-Pittsburgh case pointed out in comparing that case to the LTV case, "The difference is a matter of drama rather than substance." *USWA v. PBGC (In re Wheeling-Pittsburgh Steel Corp.)*, No. 85-793, slip op. at 25 (Bankr. W.D. Pa. June 30, 1989).

The remaining challenges to PBGC's follow-on policy center on the wisdom of PBGC's policy, rather than the permissibility of the agency's interpretation under section 4047. *Cf. Chevron*, 467 U.S. at 866. For example, the AFL-CIO and USWA argue that PBGC's follow-on policy may actually increase the incentives for companies to terminate by reducing the cost of post-termination retirement plans. Br. at 23. As the unions themselves point out, however, if follow-on plans are "remov[ed] from the bargaining table" as a result of PBGC's policy, employers are likely to face employee and union demands for concessions elsewhere, perhaps in higher wages or other kinds of benefits. Br. at 24. The same *amici* also criticize the PBGC for assuming that union or employee resistance "will overcome an employer's economic self-interest in termination." Br. at 23.[19] But PBGC's experience has been that employees are less likely to resist, and employers are more likely to terminate, if follow-on plans are permitted.[20] The responsibility for assessing the wisdom of such policy choices lies with the "agency charged with the administration of the statute in light of everyday realities," not with private constituencies or the courts. *Chevron*, 467 U.S. at 866.

[19] This argument is refuted by the facts of this case: the USWA successfully prevented LTV from terminating its Plans in a distress termination. *See* JA 241-42; 29 U.S.C. § 1341(a)(3). And after the Plans were terminated involuntarily, the USWA persuaded LTV to maintain a vigorous defense of its expenditures for the follow-on plans, even at the risk of restoration.

[20] Pension benefits are not fungible with other benefits, and no "replacement" package other than follow-on plans is likely to be nearly as satisfactory to employers and employees as the old pension plan. Thus, PBGC has reasonably concluded that taking follow-on plans "from the bargaining table" will create strong additional disincentives to termination that more than offset the hypothetical risks suggested by *amici*. Employers will face extreme pressure to keep pension plans adequately funded because employees will stand to lose substantial benefits if plans are terminated—voluntarily or involuntarily. PBGC's experienced judgment on this complex subject is entitled to considerable deference. *See Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116, 125 (1985).

In this case, PBGC's policy must be sustained because it is a reasonable policy choice consistent with the broad authority granted by Congress. *Young v. Community Nutrition Institute*, 476 U.S. at 981; *Chenery*, 332 U.S. at 207-09.[21]

II. PBGC REASONABLY DETERMINED THAT LTV'S CHANGED FINANCIAL CIRCUMSTANCES ALSO JUSTIFIED RESTORATION.

PBGC also determined restoration to be "appropriate and consistent with its duties" because LTV's financial condition had improved, eliminating the financial reasons for PBGC's original termination decision. *See* PBGC br. at 11-13, 34. Because Congress has specifically directed PBGC to encourage the continuation and maintenance of pension plans, 29 U.S.C. § 1302(a)(1), and to limit terminations to cases of "severe hardship," 29 U.S.C. § 1001b(b) (Supp. IV 1986), it was perfectly reasonable for PBGC to conclude that once the financial factors that led the agency to terminate the Plans had ceased to exist, termination was no longer appropriate or consistent with the agency's duties. *See* PBGC br. at 32-25. That is particularly true where, as here, PBGC also found that LTV could afford to fund the Plans, at least for the immediate future. JA 345.

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[21] The Parent Creditors' Committee (br. at 43-47) and the LTV Bank Group (br. at 18-27) argue that PBGC was required to obtain a court order before restoring the Plans. This argument, however, was rejected by the courts below (Pet. App. 85a-90a; *see* Pet. App. 27a), and may not be considered here because neither party filed a cross-petition for certiorari. *See TWA v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).

Their argument is baseless in any event. The plain language of section 4047 authorizes PBGC to restore a previously terminated plan by direct action, such as by transferring the plan's assets and liabilities back to the employer. 29 U.S.C. § 1347. If Congress had intended to require application to a court, it surely could have so provided in the statute, as it did elsewhere in Title IV. *See, e.g.*, 29 U.S.C. §§ 1341(c)(2)(B)(ii), 1342(c).

Ignoring PBGC's standard, the court of appeals held that an improvement in financial circumstances was not an adequate basis for restoration unless the agency could also prove that the company had the "long-term" ability to fund the plans in question. In doing so, the court invented a legal standard with no statutory basis, thus interfering with precisely "the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process." *Chenery*, 332 U.S. at 209. *See* PBGC br. at 34-37.[22]

Respondents make no serious attempt to defend the court of appeals' long-term-ability-to-fund standard, but instead emphasize yet a third standard, arguing that PBGC was required to consider whether the Plans could be reterminated by LTV under the distress tests set forth in section 4041(c)(2)(B), 29 U.S.C. § 1341(c)(2)(B). However, because this was not a proceeding to terminate a plan, that test was not relevant. In addition, the original termination was not based on any finding that the distress tests were satisfied. There simply is no statutory or logical basis for imposing on PBGC, in making a restoration decision, the burden of proving that LTV does *not* satisfy the distress tests.

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[22] Moreover, imposition of such a requirement would lead to absurd results. Here, for example, one of the factors central to PBGC's decision to terminate the Plans was the risk of shutdown liabilities. JA 138. The elimination of this risk was likewise central to the agency's decision to restore. JA 255-56 (testimony of LTV official in July 1987 that no shutdowns would occur), JA 316 (PBGC consideration of this testimony). Now, however, LTV claims that all of the plant shutdowns that PBGC anticipated in deciding to terminate the Plans had already occurred before the termination decision was made. Even if this were true, it would be all the more reason for PBGC to restore immediately. If PBGC learns that its decision to termination a plan was based on a factual misunderstanding, surely the proper course for PBGC would be "to take such action as may be necessary to restore the plan to its pretermination status," ERISA § 4047, thereby restoring full benefits to the employees and retirees. Under the court of appeals' decision, however, even in such a case PBGC would be prohibited from restoring the plan unless and until PBGC could prove that the employer had the "long-term" ability to fund it. Pet. App. 22a, 24a.

LTV, moreover, could not obtain a distress termination without first bargaining with the union. 29 U.S.C. § 1341(a)(3). It remains to be seen whether, in the absence of follow-on plans, the union would agree to termination. Indeed, even if the company can convince the union that it cannot afford the Plans in the context of its current wage and benefit package, the union might prefer to make concessions in other areas to permit the Plans to continue. And if the union ultimately were to agree to termination, LTV would still have to prove to the bankruptcy court that the only alternative to termination would be for each and every one of LTV's 66 reorganizing controlled group members to liquidate. 29 U.S.C. § 1341(c)(2)(B)(ii); 11 U.S.C. § 1113.[23] Consideration of the distress criteria by PBGC therefore was not required, would have been entirely speculative, and was wholly irrelevant to a restoration decision.[24]

Respondents also seek to attack the factual underpinnings for PBGC's assessment of LTV's short-term ability to afford the Plans, but PBGC's views are both reasonable and entitled to deference. For example, PBGC was well situated to project that upon restoration, LTV could obtain a waiver of its 1984-86 funding obligation: the pertinent statutory provision specifically requires IRS to consult with PBGC before granting a waiver. 26 U.S.C. § 412(f)(3)(A), (B). Moreover, IRS had explicitly "reserved the right to consider at a future time

[23] Moreover, LTV's dozens of non-bankrupt members would be required to make a similar showing to PBGC. 29 U.S.C. § 1341(c)(2)(B)(iii).

[24] Even if there were *now* some chance that the Plans may reterminate at a future date, that would hardly mean that restoration was inappropriate more than two years ago, in 1987. Indeed, from the point of view of plan participants (whose interests, respondents assert, are paramount) putting off termination for as long as possible was surely desirable to permit additional accruals of and eligibility for benefits. *See* AFL-CIO/USWA br. at 12 n.9 (discussing the hardship suffered by an employee whose plan terminates one day before he would have become eligible to retire under the "30 and out" program).

. . . the [requested] waivers . . . if a satisfactory settlement is reached with the PBGC." AR 708. It was also reasonable for PBGC to project that labor concessions associated with the follow-on plans would not be withdrawn upon restoration, since the benefits available upon restoration would be those which the follow-on plans sought to replace.[25]

Finally, PBGC was not unreasonable in assuming that LTV could fund the Plans from its considerable cash flow, since its annual contribution would be classified as an administrative expense. Contrary to the conclusion of the court of appeals and the arguments of the respondents, every court that has addressed the issue has concluded that contributions to an ongoing pension plan are "actual, necessary costs and expenses of preserving the estate," 11 U.S.C. § 503(b)(1), entitled to administrative expense priority (the highest unsecured priority) under 11 U.S.C. § 507(a)(1). *E.g., In re Pacific Far East Line, Inc.*, 713 F.2d 476 (9th Cir. 1983); *Columbia Packing Co. v. PBGC*, 81 Bankr. 205 (D. Mass. 1988); *In re Robinson Truck Line, Inc.*, 47 Bankr. 631, 637-38 (Bankr. N.D. Miss. 1985); *In re Bollinger Corp.*, No. 76-282, slip op. at 3-4 (Bankr. W.D. Pa. Jan. 30, 1981). These courts have recognized that ongoing contributions to a pension plan are best viewed as a current cost of doing business, since the plan is useful in attracting and retaining a workforce and the contributions are required by law for maintenance of the plan. *Cf. Alabama Power Co. v. Davis*, 431 U.S. 581, 592 (1977) ("Funding a pension program is a current cost of employing potential pension recipients, as are wages.").[26]

[25] Several of the respondents also complain that PBGC should have waited for LTV to issue its 7-year business plan. Steel Creditors br. at 22 n.7; LTV br. at 12. Notably, however, not one of them claims that this new business plan would have altered PBGC's determination. Nor would it have. To the contrary, LTV's financial condition continued to improve dramatically. *See amicus* br. of Armco, *et al.* at 20.

[26] The cases cited by the Steel Creditors (br. at 35) that require a "transaction with the debtor-in-possession" are not incon-

Administrative expenses of this kind do not have to await a plan of reorganization, but may be paid when due in the ordinary course of business. *See* 11 U.S.C. § 503(a); 3 *Collier on Bankruptcy* ¶ 503.01, at 503.08 (15th ed. 1989). Thus, contrary to the court of appeals' belief, pension plans can and should be funded by debtors-in-possession in reorganization under Chapter 11.[27]

The cases respondents cite to the contrary, such as *Trustees of Amalgamated Insurance Fund v. McFarlin's Inc.*, 789 F.2d 98 (2d Cir. 1986), are inapposite. They involve the "withdrawal liability" owed by an employer when it withdraws from a multiemployer pension plan (as by going out of business or by going non-union). *See generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984); 29 U.S.C. §§ 1381-1453. In fact, two of the withdrawal liability cases cited by respondents acknowledge that ongoing contributions are entitled to administrative expense priority. *Amalgamated Insur. Fund v. William B. Kessler, Inc.*, 55 Bankr. 735, 738-40 (S.D.N.Y. 1985); *In re Silver Wheel Freightlines, Inc.*, 57 Bankr. 476, 477 (Bankr. D. Ore. 1985).

sistent. An ongoing plan *is*, of course, maintained by the debtor-in-possession, and nothing more is required for administrative expense priority. *Cf. Reading Co. v. Brown*, 391 U.S. 471 (1968) (tort liability); *Wall Tube & Metal Products Co. v. Tennessee*, 831 F.2d 118 (6th Cir. 1987) (environmental liability).

[27] The opposing parties argue that the portion of the contributions attributable to so-called "past-service" liabilities cannot be an "actual and necessary cost of preserving the estate" because that portion allegedly is paid in consideration of the employees' past service to the company. That is wrong, as the court in *Columbia Packing* explained:

> [T]he contribution is owed to the pension fund rather than the employees themselves. The past service liability cost is more properly viewed as an actuarial unit of measure for determining the employer's current periodic contribution than as compensation for work performed before the inception of the plan.

81 Bankr. at 209. *Accord Pacific Far East Line*, 713 F.2d at 479.

The disingenuousness of respondents' argument that regular contributions to the Plans could be paid only as part of a distribution to all creditors is revealed by the fact that LTV sought and obtained approval from the bankruptcy court to fund the follow-on plans on an ongoing basis. JA 150. A large portion of the follow-on benefits, of course, cover the same past-service liabilities that the opposing parties now say cannot be paid as administrative expenses. The restored Plans could similarly be funded as administrative expenses.

III. PBGC WAS NOT REQUIRED TO CONSIDER GENERAL POLICIES UNDERLYING THE BANKRUPTCY AND LABOR LAWS.

The unique language of section 4047 directs PBGC to base its restoration decision on what is "appropriate and consistent with its duties under [Title IV]." 29 U.S.C. § 1347. Although respondents discuss bankruptcy and labor law at length, they never show how consideration of these bodies of law would have fulfilled PBGC's Title IV duties. Nor do they identify any specific *provision* of bankruptcy or labor law that conflicts with PBGC's restoration action. Rather, as LTV distills it, respondents' argument is that the follow-on plans in this case are "the direct product of these two major federal policies." LTV br. at 22. This is not enough to override PBGC's duty to apply the express statutory criteria for the exercise of its restoration authority.[28]

[28] In *Guidry v. Sheet Metal Workers National Pension Fund*, 58 U.S.L.W. 4131 (U.S. Jan. 17, 1990), this Court rejected the argument—relied on by the court of appeals in this case (Pet. App. 16a)—that 29 U.S.C. § 1144(d) required a specific ERISA provision to yield to a more general provision or goal of another statute. The Court said, "We do not believe . . . that the LMRDA will be modified, impaired, or superseded by our refusal to allow ERISA pension plans to be used to effectuate the remedial goals of the LMRDA." 58 U.S.L.W. at 4134. Similarly, neither the Bankruptcy Code nor federal labor law will be modified, impaired, or superseded by refusing to allow PBGC insurance funds to be abused. In any event, as noted in our opening brief (at 40 n.25), 29 U.S.C. § 1144(d) by its terms does not apply to this Title IV case.

No one disputes that federal labor law encourages collective bargaining as a means of resolving labor-management differences. But it hardly follows that a federal agency is required to accept an otherwise impermissible arrangement just because a company and a union agree to it in collective bargaining. Surely no one would seriously maintain this argument if LTV and the USWA had entered into an agreement discriminating against some employees on the basis of race or sex, or providing that the company would pay increased wages out of money saved by disregarding applicable safety or environmental laws. *See UMW v. Pennington*, 381 U.S. 657, 665 (1965) ("because they must bargain does not mean that the agreement reached may disregard other law").

Respondents argue that PBGC should have given more weight to the bankruptcy policy favoring rehabilitation, but like other agencies enforcing antitrust, environmental, or anti-discrimination statutes, PBGC has no obligation to bend its regulatory scheme to assist debtors' reorganization efforts. More precisely, a company receiving more than $2 billion in insurance guarantees from a federal trust fund is not exempt from the well-established rules of that agency merely because it is in bankruptcy.[29]

Because this case does not involve even a potential conflict between statutory provisions, the parties' insistent reliance on *NLRB v. Bildisco & Bildisco*, 465 U.S.

[29] The Steel Creditors argue (br. at 28) that PBGC had an obligation to compare what creditors would have received in a plan of reorganization involving restored plans with what they would receive in a liquidation where the plans were reterminated. But if, after restoration, the parties are convinced that retermination is essential to avoid liquidation, and LTV can convince the union to agree to termination, the parties will be able to invoke the jurisdiction of "the appropriate court" to determine that question. 29 U.S.C. § 1341(c)(2)(B)(ii). For PBGC to have speculated about the outcome of this process at the time of its restoration decision would have been inappropriate. *See* discussion at 14, *supra*.

513 (1984), is misplaced. *Bildisco*, unlike this case, involved a direct conflict between express provisions of two statutes. Section 365(a) of the Bankruptcy Code, which authorized a debtor to reject executory contracts, conflicted with sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, which made it an unfair labor practice to change a labor agreement unilaterally. In order to reconcile these conflicting statutes, this Court examined their respective policies, and concluded that "Congress intended" that a debtor should be allowed to reject a labor agreement, 465 U.S. at 522-23, but only upon a higher showing than the normal "business judgment" rule, *id.* at 526.

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962), is similarly inapposite. In *Burlington*, this Court held that where a secondary boycott disrupted trucking service in an area, and the boycott was "unlawful" under the statute administered by the NLRB, the Interstate Commerce Commission should not have granted a certification for service by an additional carrier without at least considering the possibility of issuing a "cease and desist" order expressly authorized under its own statute. Here, no violation of another statute was involved, and PBGC's action certainly did not trench on the jurisdiction of another agency.

Moreover, although PBGC's organic statute did not require it to do so, the agency repeatedly attempted to block the follow-on plans within the bankruptcy process. As respondents fondly recount, the agency's efforts were rejected no less than eight times. However, each of these was based on procedural grounds—not once did any court address the merits of the follow-on policy. Thus, when LTV proceeded to implement the follow-on plans during that litigation, the PBGC acted on its statutory authority to restore the plans, pursuant to the bankruptcy court's suggestion that PBGC should pursue its own administrative remedies rather than present its objections in court. *See* JA 261. The agency was not required to allow the insurance program to be abused, per-

haps for years, while it pursued an appeal from this last rejection.[30]

Finally, the *amicus* brief for the State of Ohio confirms the absurd implications of the court of appeals' holding. Ohio suggests that in deciding whether to restore the Plans, PBGC also should have considered the impact on Ohio's tax revenues and on the state's unemployment compensation and workers' compensation programs. Ohio br. at 11-12. Requiring federal agencies to consider every tangentially related "policy" or conceivable impact before taking any action could paralyze administrative decisionmaking. This Court should make it clear that such intrusive judicial review will not be countenanced.

CONCLUSION

The decision of the court of appeals should be reversed and PBGC's restoration of the Plans should be enforced.

Respectfully submitted,

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[30] Indeed, although several respondents criticize PBGC for its failure to pursue its appeal from the bankruptcy court's refusal to consider the merits of the agency's position, they fail to disclose that LTV had moved to dismiss PBGC's appeal as interlocutory.